

## **LEGAL CONSIDERATIONS FOR REVIEW OF STEAM ELECTRIC EFFLUENT GUIDELINES**

- I. ISSUE:** What are the legal considerations related to review of the 2020 “Steam Electric Reconsideration Rule,” identified as one of the actions that EPA will review pursuant to Executive Order 13990, “Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 20, 2021).
- Pursuant to direction from EPA’s Acting General Counsel, EPA received an abeyance until May 25, 2021, in the environmental group challenges to the 2020 rule pending in the Fourth Circuit.
  - Industry challenges to the 2015 steam electric rule are currently in abeyance in the Fifth Circuit pending judicial review of the 2020 rule.
- II. ENVIRONMENTAL OVERVIEW:**
- When EPA revised the steam electric effluent limitations guidelines and standards (ELGs) in 2015, it noted that the steam electric power plants contribute the greatest amount of all toxic pollutants discharged to surface waters by industrial categories regulated under the Clean Water Act. For this reason, it has been a high priority for NGO stakeholders to have these ELGs reflect the latest technological advances (see below).
  - After several decades without revisions, EPA revised the ELGs in 2015 (which was estimated to reduce pollutant discharges from the industry by 1.4 billion pounds), and it partially reconsidered and revised the ELGs again in 2020. Both rules address discharges of toxic pollutants including selenium, arsenic and mercury, as well as nutrients.
  - Neither rule limits discharges of bromides that may form carcinogenic disinfection by-products at downstream drinking water facilities, except through a voluntary program.
- III. ENVIRONMENTAL JUSTICE ASPECTS OF THE RULE:**
- EPA conducted an Environmental Justice (EJ) analysis for the 2015 and 2020 rules under Executive Order 12898.
  - For the 2015 rule, EPA explained that, due to their close proximity to these discharges and relatively high consumption of fish, some minority and low-income communities have greater exposure to, and are therefore at greater risk from, pollutants in steam electric power plant discharges. EPA found that the rule increased the level of environmental protection (reduced adverse human health and environmental effects) for all affected populations, including minority and low-income populations. Furthermore, EPA estimated that minority and low-income populations would receive, proportionately, more of the human health benefits associated with the final rule.
  - For the 2020 rule, using the 2015 rule as a baseline, EPA stated, “Overall, the various analyses showed that estimated environmental changes under the . . . [final rule] may affect

minority and/or low income populations to different degrees across environmental media, exposure pathways, and over time, but that the estimated effects (positive or negative) of the changes will be small.” One reason that EPA estimated some benefits to minority and/or low income populations under the rule was that it forecasted that some plants would choose to participate in a voluntary program with more stringent requirements (as their least-cost alternative). Environmental groups had significant comments on the EJ analysis done for this rule and overall did not believe the analysis did enough to identify and analyze impacts on EJ communities.

**IV. STAKEHOLDERS:**

- **Environmental groups:** (b) (5)
  
  
  
  
  
  
  
  
  
  
- **Industry Groups:** (b) (5)
  
  
  
  
  
  
  
  
  
  
- **Drinking Water Utilities:** (b) (5)
  
  
  
  
  
  
  
  
  
  
- **States/Tribes:** (b) (5)

V. **LITIGATION BACKGROUND AND STATUS:**

**2015 Rule Litigation and Reconsideration by the last Administration:**

- Seven petitions for review of the 2015 rule were filed by industry, environmental group, and drinking water utility petitioners and consolidated in the Fifth Circuit Court of Appeals. *Southwestern Electric Power Co., et al. v. EPA*, Case No. 15-60821 (5th Cir.). Not all aspects of the rule were challenged (*i.e.*, fly ash transport water limits, flue gas mercury control wastewater limits, subcategories, New Source Performance Standards/Pretreatment Standards for New Sources).
- On Apr. 24, 2017, the Court granted EPA's request to hold the case in abeyance pending EPA's review of the 2015 rule, in light of two petitions for reconsideration submitted by the Utility Water Act Group and the Small Business Association.
- On Aug. 22, 2017, the Court granted EPA's motion to sever and hold in abeyance aspects of the litigation relating to the parts of the 2015 rule that EPA intended to reconsider (*i.e.*, bottom ash transport water and flue gas desulfurization (FGD) wastewater for existing sources). The Court later issued a briefing schedule related to environmental group petitioners' claims in the case, which concerned wastestreams not being reconsidered by the Agency.
- On Apr. 12, 2019, the Court issued a decision vacating and remanding the 2015 combustion residual leachate regulations as unlawful under the Clean Water Act (under *Chevron* Step 1 and Step 2) and legacy wastewater regulations as arbitrary and capricious under the Administrative Procedure Act. The court cited and gave weight to an older body of caselaw articulating a fairly rigorous standard for Best Available Technology Economically Achievable (BAT) based on the language of Clean Water Act section 301(b) and the technology-forcing statutory structure, under which a driving factor for considering economics in determining BAT is achievability – what costs can be reasonably borne by the category or subcategory. *See Southwestern Elec. Power Co. (SWEPCO) v. EPA*, 920 F.3d 999, 1006 (5th Cir. 2019) (“When pollutants are regulated under this [BAT] standard, the EPA ‘must set discharge limits that reflect the amount of pollutant that would be discharged by a point source employing the best available technology that the EPA determines to be economically feasible across the category or subcategory as a whole.’ We have held that BAT limitations must ‘be based on the performance of the single best-performing plant in an industrial field.’”) (quoting *Texas Oil & Gas Ass’n v. EPA*, 161 F.3d 923, 928 (5th Cir. 1998) and *Chem. Mfrs. Ass’n v. EPA*, 870 F.2d 177, 226 (5th Cir. 1989)).
- The final Steam Electric Reconsideration Rule was published in the Federal Register at 85 Fed. Reg. 64,650 (Oct. 13, 2020).
- On Dec. 23, 2020, environmental group-intervenors moved to dismiss industry's 2015 rule claims. EPA opposed the motion on Jan. 11, 2021, on the grounds that the court should avoid an unnecessary resolution of the mootness issue at this time and continue to hold the case in abeyance until judicial review of the 2020 rule is complete.

- On Mar. 25, 2021, the Court denied the motion to dismiss industry’s petitions for review of the 2015 rule for lack of jurisdiction (mootness) and ordered that industry petitioners’ claims be held in abeyance pending judicial review of the 2020 rule.

### **2020 Rule Litigation:**

- Two petitions for review were filed and consolidated in the Fourth Circuit on Nov. 19, 2020. *Appalachian Voices et al. v. EPA*, No. 20-2187 (4th Cir.). One petition was filed by Clean Water Action; Environmental Integrity Project; Sierra Club; Waterkeeper Alliance, Inc.; Natural Resources Defense Council, Inc.; Center for Biological Diversity; PennEnvironment, Inc.; Chesapeake Climate Action Network; and Prairie Rivers Network. The other petition was filed by Appalachian Voices; Good Stewards of Rockingham; Stokes County Branch of the NAACP; and Winyah Rivers Alliance.
- EPA filed a certified index to the record on Dec. 18, 2020.
- An industry trade group (UWAG) and certain energy companies (Electric Energy, Inc.; Coletto Creek Power, LLC; Dynegy Miami Fort, LLC; Dynegy Midwest Generation, LLC; Dynegy Zimmer, LLC; Illinois Power Generating Company; Illinois Power Resources Generating, LLC; and Kincaid Generation, LLC) moved to intervene in the litigation, which the court granted on Dec. 3, 2020. UWAG also filed a motion to transfer the litigation to the Fifth Circuit. Environmental groups opposed the motion and EPA took no position. The Court has not yet ruled on it.
- On Mar. 1, 2021, the Court granted EPA’s motion to hold the case in abeyance until May 25, 2021, to allow time for EPA to review the rule pursuant to E.O. 13990.

## **VI. OVERVIEW OF THE 2020 RULE DECISIONS, LIKELY CHALLENGES TO THE RULE, AND LEGAL RISK ASSESSMENT**

To inform the Agency’s review of the 2020 rule, we review below major decisions made in the rule for the two wastestreams at issue (FGD wastewater and bottom ash) and the three subcategories established by the rule.

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